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No. 84-1557

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOHN H. HOWKINS, Esq.,
Petitioner,

v.

SAM S. CALDWELL AND J. FREEMAN RAILEY,
EACH & BOTH, INDIVIDUALLY & OFFICIALLY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENT CALDWELL'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the state employee's claims of constitutional infringements, not raised in the administrative hearing process or state court appeal, and expressly waived in open court in the state court appeal, are precluded by res judicata and collateral estoppel?

2. Whether the employee's insubordinate, disruptive and abrasive expressions in the workplace are protected by the free speech clause of the First Amendment?

3. Whether a federal court can take judicial notice of bare allegations of political relationships and intrigues, without any evidence thereof in the record?

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RESPONDENT CALDWELL'S BRIEF IN OPPOSITION

OPINIONS BELOW

The Court of Appeals affirmed without opinion (Pet. App. 13) and denied a motion for rehearing (Pet. App. 14). The decision and order of the district court is reported at 587 F. Supp. 98 (1983). The state court decision and order (Pet. App. 12) and the underlying State Personnel Board order (Pet. App. 11) and hearing officer's decision (Pet. App. 10), are unpublished.

STATEMENT OF THE CASE

This case arises from the demotion of the Petitioner from Chief Hearing Officer to Hearing Officer in the Unemployment Insurance Services Division of the Georgia Department of Labor, due to insubordination and managerial incompetence. The Respondents were formerly the Georgia Commissioner of Labor and the Chief of the Employment Security Agency of the Georgia Department of Labor, respectively.

For clear understanding of the issues, the Court should know the evidence presented at the administrative hearing in support of the demotion, summarized in the Findings of Fact entered by the State Personnel Board's hearing officer (Pet. App. 10).

A. The Record and Decision and the State Personnel Board.

The first ground for demotion was insubordination involved in the Petitioner's refusal to respect binding precedents of the Board of Review, which is the highest administrative review body of the Employment Security Agency, Georgia Department of Labor. (Resp. App. 1; Pet. App. 10). There was evidence that the Appellant challenged a decision of the Board of Review in a very abrasive manner (SPB-105),[1] and had a "heated exchange" with members of the Board of Review denying the precedent-setting authority of the Board of Review. (SPB-295-97). He defied a precedent set by the Board of Review by entering a ruling directly contrary to such precedent (SPB-380, 381),

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[1] References to the State Personnel Board hearing transcript, which is not reproduced herein due to its length, will be designated "SPB," followed by the page number of the transcript.

and directed at least one other Hearing Officer under his supervision to similarly disregard Board of Review precedent. (SPB-37).

The second ground for demotion was Appellant's ineffectiveness and inefficiency as a supervisor. There was much evidence of the Appellant's vacillation and inconsistency as a manager, often reversing policies from day to day, and contributing to unnecessary stress and poor morale among his subordinates. (SPB-69, 70, 91, 102, 243, 250, 334). He disregarded equipment purchasing procedures by ordering recording equipment without prior authorization. (SPB-359). He apparently exercised "management by intimidation," as evidenced by such incidents of rudeness as turning and walking off without speaking when introduced to a new Hearing Officer on his staff (SPB-319), reprimanding one Hearing Officer in the presence of another Hearing Officer (SPB-237), screaming at subordinates (SPB-237), and walking out of a room in the middle of a conversation with another Hearing Officer to avoid a discussion. (SPB-335). At times he talked to Hearing Officer subordinates in a derogatory fashion about other Hearing Officers. (SPB-240, 320). He refused to give subordinates their regular performance evaluations, to which they were entitled, but instead tore up the evaluations and threw them in the trash. (SPB-332). The Appellant apparently suffered from a severe inability to concentrate his attention on discussion of cases, and that difficulty increased with time after he became Chief Hearing Officer. (SPB-253, 254). His poor human relations and communications skills led to unnecessary friction among his staff, which improved dramatically after his demotion. (SPB-261, 326). He so poorly admin-

istered the caseload of the Hearing Officers under his supervision that files got stuck on his desk for long periods, delaying release of decisions (SPB-337, 338). When his successor took over after his demotion, there was a backlog of 666 untyped decisions, 248 of which were over 75 days old, and no case reports had been sent to Archives (as required by Federal Court Order) in six months. (SPB-357, 358). The Petitioner was generally considered a poor leader and poor manager. (SPB-108, 261).

The State Personnel Board hearing officer entered findings (Pet. App. 10) which were approved by the Board (Pet. App. 11).

B. The State Court Appeal.

In his appeal from the State Personnel Board to the Superior Court of Fulton County, the Petitioner raised no constitutional issues in his pleadings (Resp. App. 2) and waived all constitutional claims in open court (Pet. App. 12).

C. The District Court Action.

The Petitioner then filed a civil rights action in United States District Court (Resp. App. 3), upon which the court granted summary judgment in favor of the Respondents. *Howkins* v. *Caldwell*, 587 F. Supp. 98 (1983). There remains pending in District Court a claim of alleged retaliation, which the Petitioner added by amendment while the Respondents' Motion for Summary Judgment was under advisement. Proceedings in the retaliation claim have been stayed pending the present appeal.

D. The Decision of the Court of Appeals.

On appeal to the Eleventh Circuit Court of Appeals, the Petitioner argued only the applicability of res judicata and collateral estoppel, and the distinction between "any evidence" and "substantial evidence" standards of review, omitting and waiving all other issues. (Resp. App. 4, 5).

ARGUMENT

I. The Petition is Deficient and Should be Summarily Denied.

A. There are no "special and important reasons" for discretionary review.

None of the issues argued by the Petitioner involve conflicts between circuits, conflicts between federal and state courts, departures from the usual course of judicial proceedings, or important federal law questions requiring initial consideration. Therefore, the Supreme Court should not allocate time and resources to a discretionary review of this case. Sup. Ct. R. 17.

B. The Petitioner seeks new determinations of issues of fact, including some apparently never alleged in the proceedings below.

The Petitioner makes numerous crucial factual contentions apparently never alleged, presented or considered below, and which are totally unsupported in the record in this case. For example, he states without support that the State Merit System hearing officers "could be fired at any time and told to move out before sundown," (Pet. 36-37), that evidence against the Petitioner was "created" (Pet. 19-20), that all

the witnesses against the Petitioner had a "very close relationship" with Mr. Caldwell (Pet. 15), and that Mr. Caldwell's "only mistake" was that he supported the wrong candidate for governor (Pet. 18). Woven throughout is an elaborate conspiracy theory never supported by evidence in the lower courts.

The Petitioner had ample opportunity to conduct discovery in the state court and district court proceedings and obtain evidence to support these allegations, if they could be supported, and he failed to do so. There is no record in this case to support such allegations. Now he seeks a "second bite at the apple" by asking the Supreme Court to act as the finder of fact on matters that were either not raised, or decided adversely to him, in the courts below. That is not the usual job of the Supreme Court. The Petition should be denied. *See, e.g., United States* v. *Shubert,* 348 U.S. 222 (1955).

C. Lacking "accuracy, brevity and clearness," the Petition should be denied.

The Petition for Certiorari is 52 pages long, excluding subject index, table of authorities, verbatim quotations and lengthy appendices. It contains a rambling narrative of the personal recollections of the Petitioner and lengthy innuendos of immaterial matters involving this Respondent and recent Georgia political history. There is some limited reference to the record of this case, but much reference to unrelated newspaper articles, editorials and rumors about the Respondent. For failure "to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring

consideration," the Petition should be denied. Sup. Ct. R. 21.1(8), 21.4, 21.5.

D. Burdened with "irrelevant, immaterial and scandalous matter," the Petition should be denied.

The Petition contains 18 pages of reproductions of newspaper articles and pleadings in criminal cases, and six pages of unsupported narrative on Georgia politics, all of which are "burdensome, irrelevant, immaterial and scandalous matter" as to this action. The Court should disregard, strike and deny the Petition. Sup. Ct. R. 34.6.

II. The Petitioner's Claim of Bias on the Part of the State Personnel Board's Hearing Officer is a Bare Allegation, not supported by evidence, and was waived by omission from the appeal to the Eleventh Circuit.

The chief issue which the Petitioner has raised in this Court is the alleged lack of an unbiased hearing examiner. The district court's pithy ruling on this issue is adequate:

> "Clinging to the last straw, Howkins beckons this court to conclude on innuendo alone that Hearing Officer Theus, who presided over Howkins' hearing, was not impartial. In support of this claim Howkins asks this court to take judicial notice of the following: [wherein the Court lists six contentions of political and bureaucratic intrigue]. And the list goes on. These are not matters of which this court can take judicial notice. In addition, the record is totally devoid of any facts supporting these bald allegations. There is nothing in that transcript to support Howkins' claim that the hearing was conducted in a biased or prejudiced manner that affected his rights. . . . Accord-

ingly, this court considers this claim to be meritless."

Howkins, 587 F. Supp. at 107, 108.

The Petitioner omitted this issue from his appeal to the Eleventh Circuit (Resp. App. 4), and by such omission waived its further consideration.

III. Insubordinate, Disruptive and Abrasive Expressions in the Workplace are not Protected by the First Amendment.

Speech closely connected with insubordination is not protected by the First Amendment. *Williams* v. *Day,* 553 F.2d 1160, 1162 (8th Cir., 1977). Neither is speech which interferes with the operation of the workplace. *Sprague* v. *Fitzpatrick,* 546 F.2d 560, 565-66 (3d Cir., 1976), *cert. denied,* 431 U.S. 937 (1977); *Kannisto* v. *City and County of San Francisco,* 541 F.2d 841, 844 (9th Cir., 1976), *cert. denied,* 430 U.S. 931 (1977); *Schneider* v. *City of Atlanta,* 628 F.2d 915, 919 (5th Cir., 1980); *Phillips* v. *Adult Probation Dept.,* 491 F.2d 951, 954-55 (9th Cir., 1974). When an employee's abrasive personality and unsatisfactory work performance alone justify a termination or demotion, a mere allegation by the employee that his exercise of free speech motivated the action will not save him. *Mt. Healthy School Dist. Board of Education* v. *Doyle,* 429 U.S. 274, 287 (1977); *Hillis* v. *Steven F. Austin State University,* 665 F.2d 547, 551-2 (5th Cir.), *cert. denied,* 457 U.S. 1106 (1982).

As noted by the district court, the Petitioner's conduct was insubordinate, interfered with the operations of his superiors on the Board of Review, and disrupted the working environment of his subordinates. The Petitioner was unable to support his naked

contention that but for his insubordinate act (which he characterized as protected speech), he would not have been demoted. *Howkins,* 584 F. Supp. at 107.

IV. Res Judicata and Collateral Estoppel Bar the Petitioner's Claim.

The district court found that the Petitioner's present federal action is barred by the preclusive doctrines of res judicata and collateral estoppel, consistent with the applicable rules of Georgia law and constitutional requirements of due process. *Howkins* v. *Caldwell, et al.,* 587 F. Supp. 98 (1983). *See, Allen* v. *McMurray,* 449 U.S. 90 (1980) ("Allen"); *Kremer* v. *Chemical Construction Corp.,* 456 U.S. 461 (1982) ("Kremer"); *Haring* v. *Prosise,* 462 U.S. 306 (1983) ("Haring"); and *Migra* v. *Warren City School Dist. Bd. of Education,* 104 S.Ct. 892 (1984) ("Migra").

> "[S]tate proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full-faith-and-credit guaranteed by federal law. . . . [W]e must bear in mind that no single model of procedural fairness, let alone a particular form and procedure, is dictated by the Due Process Clause."

Kremer, 456 U.S. at 481, 482. *Accord, Migra,* 104 S.Ct. at 896.

"What the Fourteenth Amendment does require . . . is an opportunity granted at a meaningful time and in a meaningful manner . . . for a hearing appropriate to the nature of the case." *Logan* v. *Zimmerman Brush Co.,* 455 U.S. 422 (1982).

A. Review of the Entire Record Shows That The Evidence Was Sufficiently Substantial To Satisfy Requirements of Due Process and Give The State Court Judgment Preclusive Effect.

The "substantial evidence" test is "quintessentially a case-by-case analysis requiring review of the whole record." *Calhoun* v. *Bailar,* 626 F.2d 145, 148 (9th Cir., 1980), *cert. denied,* 452 U.S. 906 (1981); *Connor* v. *U.S. Civil Service Comm.,* 721 F.2d 1054 (6th Cir., 1983). Generally, the application of the "substantial evidence" test in the civil service employment context consists of a review of whole record to determine whether basic procedural requirements have been satisfied and whether the agency's action was based on substantial evidence, as opposed to being arbitrary or capricious. *See Charlton* v. *United States,* 412 F.2d 390 (3rd Cir., 1969), *cert. denied,* 409 U.S. 1027 (1972). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Home Health Services of the U.S., Inc.* v. *Schweiker,* 683 F.2d 353, 356 (11th Cir., 1982). *See also, Boylan* v. *U.S. Postal Service,* 704 F.2d 573 (11th Cir., 1983), *reh. denied,* 709 F.2d 716, *cert. denied,* 104 S.Ct. 1916 (1984).

Review of the whole record in this case shows that evidence presented to the Georgia State Personnel Board was substantial, indeed more than ample to support demotion from a supervisory position to one which did not involve management and supervision of other Hearing Officers and staff.

The "substantial evidence" test is not a technical requirement to be mechanically applied by the Court below. It is a broad standard of due process to be con-

sidered by an appellate court in review of the whole record.

Even assuming *arguendo* that "substantial evidence" is a mechanical test for the trial court, the evidence to justify demotion in this case is so substantial that application of the "any evidence" standard pursuant to *Hall* v. *Ault,* 240 Ga. 585 (1978), if in error, did not defeat substantial justice or affect the substantial rights of the Appellant. If error at all, it was harmless and not reversible. Fed. R. Civ. P. 61.

B. The Petitioner Did Have a Full and Fair Opportunity To Litigate All Issues In the Georgia Courts, and Freely Waived That Right.

Even if the question of constitutionality of the "any evidence" rule prescribed in *Hall* v. *Ault,* 240 Ga. 585 (1978), were not pretermitted by the substantiality of evidence in the record, which renders it harmless, Petitioner fails to show any reason why all issues, including constitutional ones, could not have been fully and fairly litigated in the Georgia courts.

Contrary to the Petitioner's contention, Georgia law would permit the Superior Court to consider constitutional claims of violation of due process resulting from bias of the hearing officer or improper makeup of the State Personnel Board, even if not raised in the administrative hearing. That would have required the Petitioner to present evidence to support those claims, rather than relying upon bald allegations, as provided by Official Code of Georgia Annotated § 50-13-19(g):

> "The review shall be conducted by the Court without a jury and shall be confined to the record. *In cases of alleged irregularities in procedure before*

> *the agency, not shown in the record, proof thereon may be taken in the Court. . . .*" O.C.G.A. § 50-13-19(g). (emphasis supplied)

The Fifth Circuit, in *Nilson* v. *City of Moss Point, Miss.,* 701 F.2d 556 (5th Cir., 1983), held that "res judicata . . . bars all claims that were *or could have been* advanced in support of the cause of action on the occasion of its former adjudication." Citing *Allen* v. *McCurry,* 449 U.S. 90 (1980), the court in *Nilson* held that multiple remedies for a given wrong must be asserted together, not serially. *Nilson,* 701 F.2d at 560.

In *Eliason Corp.* v. *Bureau of Safety & Regulation,* 564 F. Supp. 1298 (W.D. Mich., 1983), the court held that res judicata and collateral estoppel preclude relitigation in a federal proceeding under 28 U.S.C. § 1983 of issues which either were, or might have been, litigated in prior state proceedings. *See also, Southern Jam, Inc.* v. *Robinson,* 675 F.2d 94 (5th Cir., 1982).

The case of *Miller* v. *Hartwood Apts.,* 689 F.2d 1239 (5th Cir., 1982), upon which Petitioner relied in the Eleventh Circuit, is inapposite. In *Miller,* the Mississippi Justice of the Peace Court had jurisdiction to determine only possessory rights, and lacked jurisdiction to consider any equitable or constiutional issues. *Id.* at 1242. The Superior Court of Fulton County, Georgia, on the other hand, is a court of general jurisdiction in law and equity which could have considered any issues the Appellant might have chosen to raise. Const. of the State of Georgia, 1983, Art. 6, § 4, ¶ 1; Official Code of Georgia Annotated § 15-6-8. It cannot be assumed that the Superior Court of Fulton County or the Supreme Court of Georgia

would not have seriously considered a well-reasoned constitutional argument fairly related to evidence in the record of the case.

The Petitioner, who is a licensed attorney and experienced quasi-judicial Hearing Officer, proceeded *pro se* in Fulton Superior Court. He did not raise any constitutional issues in his pleadings (Resp. App. 2), and expressly waived any constitutional claims in open court. (Pet. App. 12). "The fact that (the Petitioner) failed to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy." *Kremer,* 456 U.S. at 485.

C. The Petitioner's Action Is Barred by Applicable Georgia Rules of Preclusion.

Federal courts must apply state preclusion rules in actions filed pursuant to 28 U.S.C. § 1983, insofar as their application is not inconsistent with minimal standards of due process. *Migra,* 104 S.Ct. at 898.

Georgia law recognizes three forms of preclusion by prior adjudication, *Lowe Engineers, Inc.* v. *Royal Indemnity Co.,* 164 Ga. App. 255 (1982):

> (1) "The doctrine of res judicata arises from a judgment of a court of competent jurisdiction as between the same parties of their privies as to all matters put in issue, or which under the rules of law *might have been put in issue,* in the cause in which the judgment rendered."
>
> (2) "A plea of estoppel by judgment . . . stems from the doctrine of res judicata where there has been a former adjudication of the same issues by the same parties or their privies, even though the adjudication may not have been upon the same

cause of action. . . . Estoppel by judgment is sometimes referred interchangeably as collateral estoppel or as . . . estoppel by judgment.

(3) The doctrine of binding precedent "provides where the issue of liability has previously been adjudicated with negative results for a party contending for the same rights in subsequent litigation, even though not res judicata, estoppel by judgment nor collateral estoppel as to the present action, because the parties are different, does constitute binding precedent, inasmuch as the controlling issue . . . has already been adjudicated under substantially similar allegations." *Id.* at 258-9. (emphasis supplied)

The Petitioner's cause of action is thus precluded under Georgia law. The Respondents are in this case only by virtue of their roles as former officials of the Georgia Department of Labor, and their defense herein is provided by the State of Georgia; their privity with the Georgia Department of Labor cannot be seriously disputed. This case is based upon the same situation which was involved in the Superior Court proceeding.

The Petitioner had ample motivation to fully litigate all issues, constitutional and otherwise, in the state court proceeding. *Haring, supra.* Thus, Georgia law would give the Superior Court judgment *res judicata* effect as to any issues which were or might have been raised in that proceeding. Alternatively, the former adjudication of the same matters in an action between the same parties or privies, although not on the same cause of action, would invoke estoppel by judgment under Georgia law. Finally, the third doctrine of preclusion under Georgia law, the doctrine of binding precedent, could preclude the Petitioner from attempt-

ing to relitigate the central issue of the propriety of his demotion and the due process of procedures involved therein.

D. The Petitioner had all the process that was due him.

The Petitioner fails to show how he could have been harmed by any alleged deficiency in the proceedings in the state court. He had a full opportunity to litigate all issues, failed to raise any constitutional issues in his pleadings there, and expressly waived all constitutional issues in open court. While the state court referred to the "any evidence" rule set forth in *Hall* v. *Ault, supra* (Resp. App. 5), review of the whole record shows that the result could not have been different if a "substantial evidence" rule have been cited.

V. The Doctrine of Qualified Good Faith Immunity Supports the Judgment.

In *Davis* v. *Scherer,* 104 S.Ct. 3012 (1984), this Court reasserted the qualified good faith immunity of public officials from § 1983 liability in the context of disciplinary discharge of a public employee. *See also Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982); *Butz* v. *Economou,* 438 U.S. 478 (1978); *Wood* v. *Strickland,* 420 U.S. 308, 320 (1975).

The test of qualified immunity depends upon "objective reasonableness of (the officials') conduct as measured by reference to clearly established law" and "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow,* 457 U.S. at 818.

The record in the instant case does not show any violation of clearly established rights of which a reasonable person would have known. On the contrary, the record shows that the heavy weight of the evidence presented to the State Personnel Board was to the effect that Howkins was insubordinate in that he deliberately disregarded precedents of the Board of Review in his work as a Hearing Officer, and that he was an exceptionally incompetent manager, totally incapable of properly handling his supervisory responsibilities. Thus, his demotion from a supervisory position to a non-supervisory position was fully justified. (Pet. App. 10).

Subjective motives of the Respondents, if any, are immaterial, as the demotion was objectively reasonable under existing law in light of the Petitioner's totally unsatisfactory job performance in his supervisory capacity, pursuant to Georgia State Personnel Board Rules and Regulations ¶ 15,203, which provides for demotion due to negligence or inefficiency. Mere irregularity in following State Personnel Board procedures would not remove the Appellee's immunity. *Davis, supra.*

VI. Conclusion.

The Petitioner could have fully li igated his claims of violation of free speech and due process in the Georgia courts, simply by taking the trouble to present evidence and develop a record upon which the state courts could rule. For whatever reason, he chose to proceed in both state and federal courts on the basis of bald allegations and innuendo, unsupported by any evidence, apparent'y relying solely upon ad-

verse publicity about this Respondent to carry his case for him.

The conduct of the Petitioner, which he asserts was constitutionally protected speech, was mere unprotected insubordination and disruption of the workplace. There was substantial evidence of insubordination and managerial inefficiency and incompetence to support his demotion from a supervisory position to one involving no supervisory responsibilities. Rather than complaining of his demotion he should be thankful that he was not fired.

Therefore, certiorari should be denied.

Respectfully submitted,

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April 1985

APPENDIX

APPENDIX 1

Letter from Sam Caldwell to John H. Howkins, March 6, 1981

GEORGIA DEPARTMENT OF LABOR
EMPLOYMENT SECURITY AGENCY
Atlanta

* * *

March 6, 1981

Mr. John H. Howkins
Georgia Department of Labor
254 Washington Street, S.W.
Atlanta, Georgia 30334

Dear Mr. Howkins:

By this letter, I acknowledge receipt of your Responses dated March 4, 1981, and March 6, 1981 respectively.

This letter is to notify you of the final action of your demotion from Administrative Hearing Officer IV on paygrade 39 to Administrative Hearing Officer III on paygrade 36, to become effective at the close of business March 9, 1981. This action is being taken pursuant to Rule 15 of the Rules and Regulations of the State Personnel Board, due to your negligence or inefficiency in performing assigned duties; inability or unfitness to perform assigned duties; and misconduct.

The specific reasons for this final adverse action are:

(1) Your inability to perform assigned duties in that on December 1, 1980, you challenged a decision of the Board of Review. As you are aware, the Board of Review is, by law, the highest administrative review body within the Employment Security Agency of the Georgia Department of Labor.

(2) Inability to supervise employees of your section. On several occasions high level Hearing Officers have threatened to resign due to your lack of leadership. Your moment-to-moment or day-to-day changing of instructions to Hearing Officers has led to frustration among the employees of the Appeals Section to the point that there have been physical and emotional problems with employees.

You have the right to appeal this determination to the State Personnel Board pursuant to Rule 14 of the Rules and Regulations of the State Personnel Board, by filing an appeal in writing with the Commissioner of the State Merit System within fifteen (15) calendar days from the date you receive this letter or the date of the proposed action, whichever is later. Failure to file an appeal within the specified time will result in the waiver of all further appeal rights including any appeal to the State Personnel Board.

I consider any of the specific reasons set forth above to warrant the actions taken by this letter. If you fail to perform your duties as Administrative Hearing Officer III, more severe disciplinary actions will be taken.

Sincerely,

/s/ SAM CALDWELL
Sam Caldwell
Commissioner of Labor

jj

cc: Ms. Farris N. Freeman
Mr. J. Freeman Railey
State Merit System
Payroll Section

APPENDIX 2

Petition for Review of Decision of Georgia State Personnel Board, John H. Howkins, Administrative Hearing Officer IV, Plaintiff vs. Georgia Department of Labor, Superior Court of Fulton County, State of Georgia, Civil Action No. C-77793

* * * *

I. JURISDICTION

The Petitioner files this Petition for Review and Revocation of the Decision of the State Personnel Board of the State of Georgia, Case #81-124, under authority of 40 GA Code Ann. 2207.1(i). The decision was rendered on July 22, 1981, attached hereto, and upheld the demotion of Petitioner contrary to the law and evidence in the case.

II. GROUNDS

1. Under 40 GA Code Ann. 2207.1(a) and (b), the State Personnel Board is entitled to conduct hearings on "a dismissal or other purported violation of the rules and regulations of the several departments . . ."

By the language cited, the only ground permitted in support of a downgrade action is "violation of the rules and regulations" of the Department to which Petitioner was assigned, i.e. the Georgia Department of Labor. However, no rule nor any regulation has been cited either in charges or in the Findings of Fact published by the Hearing Officer.

2. (a) A finding was made that Petitioner issued instructions "to do something one way one day and would have the instructions changed the next day" and that this created attitude problems. The Finding states only part of the facts and ignores others in that this changing occurred mostly when schedules had to be changed to accommodate unexpected absences of hearing officers, and they also occurred as a result of pressures brought about by disagreements

between hearing officers and the schedule clerk (Transcript Page 327, Line 10-14) because hearing officers were under pressure to work full schedules. Hearing officers also argued against the requirement established by Petitioner that they keep up their own precedent manuals, and Petitioner agreed at one time that they could use the office copy. However, when it was found that none of them would read the office copy the order was changed to require them to resume filing in their own individual manuals. No rule or regulation of the Deaprtment or instruction from a superior was involved.

2. (b) The hearing officer complaint that Petitioner was "constantly talking to the hearing officer" has no basis in the evidence and ignores the fact that Petitioner was trying to control problems caused by that hearing officer (Transcript Page 342, Line 11-23), (Page 240, Line 22), (Page 455, Line 14), (Page 400, Line 4-10), and (Page 401, Line 11-21).

3. That Petitioner "was at times indecisive, argumentative towards; generally (Petitioner) seemed to have opinions that differed from other staff members, many of whom had twenty (20) or more years of service;..." This Finding cites no rule or instruction that was violated and ignores the Fact that the arguments were concerned with the correct application of law controlling the Department of Labor (Transcript Page 127, Line 24), all of which arguments of Petitioner have been vindicated to date save only as to the "Pike" decisions. As to the Fantroyal decision, Petitioner forewarned his supervisor (Page 390, 391, and 392) that guidelines should be prepared as the Federal Judge would almost surely require them. There were other incidents where Petitioner used his expertise to show the correct application of law such as following a state decision, contrary to argument raised by Department counsel (Page 40, Line 2-8) (contradicted at Page 410-413) (Page 47, Line 17—Page 52, Line 1). (Also see letter attached). The pressure was kept up by Mr. J. Freeman Railey's harrassment, causing great difficulty in Petitioner's management

of the Section (Page 396-397), (Page 415-423, Line 13), (Page 443, Line 13,—Page 444), and (Page 95, Line 15) (contra at Page 245, Line 4). Mr Railey issued conflicting instructions to Petitioner's subordinate without prior notice to Petitioner (Page 122-123).

4. This finding departs from the charges and fails to recognize priority assignments and Petitioner's reprimand to the office manager. Extra personnel hours were required and budgets were under tight restriction at the time.

5. (a) The Board of Review was asked by Petitioner to set up a system of precedence so that conflicts in their decisions could be brought under control (Page 404, Line 13). Petitioner was not nor has at any time been abrasive with the Board. Petitioner never "approached the Board" on the subject of the Pike decisions but was summoned and questioned about his opinion, which questions he answered (Page 403, Line 22,—Page 405, Line 4). Mr. Railey contradicted by Board member Brady's testimony (Page 295, Line 16) (Mr. Railey at Page 105, Line 18-23). Petitioner in response to Board questions, replied "No that is not my understanding" (Page 307, Line 14-20). Board members found no difficulty in getting along with Petitioner (Page 308, Line 7) and (Page 316, Line 11). Board member does not know whether or not Board is a precedent board (Page 313, Line 12).

5. (b) Petitioner wrote memo to Mr. Railey about legal errors in "Pike" decisions and did so at the request of Mr. Railey (Page 457, Line 8-10).

III. PROCEDURES

Petitioner further shows the Court that errors were committed in the conduct of the Hearing by Reese Theus the Hearing Officer as follows:

1. Petitioner was denied (off record) an opportunity to join in his own defense as co-counsel and was again denied

this opportunity on the record (Page 137, Line 20-22). Such denial is contrary to the code provision requiring that "The Board shall give effect to the rules of privilege recognized by law." 40 GA Code Ann. 2207.1(d)(1).

2. Hearsay exclusions were improperly applied in numerous cases; examples are:

(a) Petitioner was not permitted to quote his supervisor, but supervisor frequently was allowed to quote Petitioner upon cross examination. Mr. Jones states (at Page 442, Line 10), "I will object to anything Mr. Railey said." The objection was sustained. Thus Petitioner was placed under a gag rule. Petitioner's subordinate was allowed to quote Petitioner, over objection (Page 329, Line 10-19). Mrs. Margaret Kohn was then allowed to load the record with half truths and innuendo, Petitioner attempted to further quote his adversary but objection was sustained (Page 393, Line 13). The hearsay rule was explained before the hearing officer but quoting the opposite side was ruled to be subject to exclusion (Page 394, Line 20-24).

(b) The Hearing Officer compounded hearsay by developing further hearsay evidence after objection was taken by Petitioner (Page 69-71).

3. Cross examination (Offer of Proof) was denied by Hearing Officer. (Page 78, 79, and 80). This made it unfairly difficult to show that confusion in the Appeals Section was generated from higher supervision. Cross examination was denied to show intent to cause confusion by memo written contrary to the rule of law, as given by Federal and State decision.

4. Testimony and evidence as to memo from Commissioner of Labor were accepted to show that instructions were issued before the alleged misconduct when the memo was actually issued after action complained of (Page 105, Line 9-15).

5. There was no showing of prior warning of any kind, but most of the testimony (all of the testimony from subordinates) complained of incidents that occurred more than a year prior to the notice of downgrade (Page 255, Line 1). Subordinate hearing officers complained about a clerk who left the Appeal Section in May, 1981. Other incidents were presented to Mr. Railey nine months to two years prior to the notice to Petitioner, but Petitioner continued to be rated "above average" in performance. His conferences with Petitioner were not unusual (Page 115, Line 2-12). Hearing officers in the Appeal section thus were allowed to air personal feelings, most of which showed objection to following legal methods.

6. Contradictions in evidence offered against Petitioner were not considered as affecting the probative value of such testimony and were otherwise ignored: "Mr. Howkins had approached the Board" (Page 105, Line 18-23) by Mr. Railey "Let's call Mr. Howkins up now" (Page 295, Line 16) by Board Member Brady. Also Page 29, Line 18 is contradicted at Page 73, Line 7-8).

7. The Merit system has made a promotion by negotiation, showing illegal preference and now attempts to justify a demotion similarly as a favor to an operating official, in violation of Plaintiff's Constitutional rights under the 14th Amendment of the Constitution.

WHEREFORE, Plaintiff prays:

(a) That summons and process issue as provided by law.

(b) That Plaintiff be granted an Order of full reinstatement.

(c) That this Court grant any other and further relief it deem proper in the premises.

(d) That Service of Process be perfected by serving:

State Personnel Board
244 Washington Street, SW
Atlanta, Georgia 30334

and

Commissioner of Labor
Georgia Department of Labor
254 Washington Street, SW
Atlanta, Georgia 30334

/s/ JOHN H. HOWKINS
John H. Howkins
Attorney for Plaintiff

2954 Rockingham Drive, NW
Atlanta, Georgia 30327

APPENDIX 3

Complaint in John H. Howkins v. Sam S. Caldwell, et al., United States District Court, Northern District of Georgia, Atlanta Division, Civil Action File No. C82-2308A

* * *

COMPLAINT

Plaintiff sues defendants Sam S. Caldwell and J. Freeman Railey and alleges:

1.

This action is brought and the Court has jurisdiction pursuant to the 14th Amendment of the Constitution, 42 U.S.C. § 1983, and 28 U.S.C. §§ 1331 and 1343.

2.

Defendant Caldwell is and has been at all times relevant herein Commissioner of the Department of Labor of the State of Georgia, and is sued in his individual and official capacity.

3.

Defendant Railey is and has been at all times relevant herein Unemployment Insurance Division Director of the Employment Security Agency of the Department of Labor of the State of Georgia, and is sued in his individual and official capacity.

4.

Both defendants are subject to the jurisdiction and venue of the Court.

5.

In April, 1970, plaintiff was employed as an Appeals Referee with the Employment Security Agency of the

Georgia Department of Labor. In approximately July, 1977, plaintiff was promoted to Chief Administrative Hearing Officer for such agency, a position held by plaintiff until approximately December 8, 1980.

6.

In such position, plaintiff was in the classified service of the State of Georgia and subject to the provisions of the State Merit System.

7.

Throughout the period alleged in paragraph 5 above, plaintiff received various and periodic performance ratings ranging from good, to very good, to excellent.

8.

On or about December 4, 1980, an attorney of the Employment Security Agency improperly, unethically, and unlawfully attempted to influence a decision of an Appeals Referee under the supervision of plaintiff in a case involving the discharge of a Department of Labor employee, wherein the said attorney appeared as an advocate and representative of the Department of Labor against the discharged employee, when at the time, before, and thereafter, said attorney, under the direction of defendants, was actively and continuously training and instructing Appeals Referees of the Employment Security Agency, including the said Appeals Referee.

9.

On or about December 4, 1980, plaintiff, pursuant to his professional obligations, duly made a protest to defendant Railey concerning the conduct of said attorney, as described above, and requested that said attorney be removed from the case.

10.

On or about December 8, 1980, defendants removed plaintiff from his position as Chief Administrative Hearing Officer and demoted him to a position of Appeals Referee.

11.

Defendants' acts of removing and demoting plaintiff, as alleged herein, were done:

a. In retaliation for plaintiff's protest and request as alleged in paragraph 9 above;

b. Arbitrarily, capriciously, and in bad faith;

c. Under color of statute, ordinance, regulation, custom or usage of the State of Georgia;

d. Willfully, conspiratorily, and maliciously.

12.

Defendants' acts, as alleged herein, had and continue to have the direct, intended, and foreseeable consequences of inflicting on plaintiff great physical, emotional, and mental anxiety, humiliation, pain, and suffering.

13.

Defendants' removal and demotion of plaintiff, as alleged herein, constituted a denial of plaintiff's right to due process of law and of his rights of equal protection of the law in relation to a valuable property right of plaintiff.

14.

Plaintiff, if having any obligation to do so, has exhausted his administrative remedies; alternatively, plaintiff avers that efforts to exhaust his administrative remedies are and have been futile and in and of themselves a denial of his rights to due process and equal protection.

15.

Defendants continue maliciously and unlawfully to cause injury to plaintiff by obstructing and interfering with plaintiff in the performance of his job, including defendants' unlawful and improper efforts to influence plaintiff in his decsions as an Appeals Referee, thereby jeopardizing plaintiff's tenure, earnings, and retirement prospects.

WHEREFORE, plaintiff demands judgment for:

a. Compensatory damages in the amount of $50,000.00;

b. Punitive damages in the amount of $300,000.00 to deter defendants from such conduct in the future;

c. Special damages to be set forth subsequently by amendment;

d. Costs, interest, and attorney fees;

e. An order requiring defendants, their successors, and any persons acting in concert with them, to reinstate plaintiff to his rightful position as Chief Administrative Hearing Officer; make plaintiff whole for any and all losses occasioned by defendants' wrongful removal and demotion of plaintiff; and take all steps reasonably necessary to permit plaintiff to perform his rightful duties, including advising all appropriate persons of plaintiff's reinstatement;

f. Such other and further relief as may be deemed appropriate by the Court.

Further, plaintiff demands trial by jury.

/s/ Frank E. Specht
Frank E. Specht
Attorney for Plaintiff

550 RiverEdge One
5500 Interstate North Parkway
Atlanta, Georgia 30328
(404) 952-6550

APPENDIX 4

Excerpt from Table of Contents, Brief for Plaintiff-Appellant, John H. Howkins v. Sam S. Caldwell, et al., United States Court of Appeals for the Eleventh Circuit, Docket No. 84-8452

* * *

Argument

POINT I

The Doctrine of Preclusion Does Not Bar Plaintiff's Action 8

A. The "any evidence" test, as applied by the Georgia courts, does not meet minimal due process requirements and thus does not meet the "full and fair opportunity to litigate" qualification of *Allen* v. *McCurry*. Substantial evidence is the minimal requirement of due process 9

B. Plaintiff did not have a full and fair opportunity to litigate his due process claim in the state proceedings; the Georgia courts were unable or unwilling to protect plaintiff's federal rights; and plaintiff's due process rights were not something he "might have litigated" in the state proceedings 14

C. Neither the District Court nor defendants established that Georgia courts would apply preclusion in the circumstances of the instant case. 18

D. Any doubts as to the applicability of preclusion should be resolved against preclusion. Defendants had the burden of establishing preclusion but failed to sustain that burden 19

E. Preclusion is not applicable where the prior state proceedings, from which preclusion is asserted, did not consist of traditional or substantial involvement 21

F. Federal judicial policy considerations are persuasive to reject preclusion 23

APPENDIX 5

Excerpt from Table of Contents, Reply Brief for Plaintiff-Appellant, John H. Howkins v. Sam S. Caldwell, et al., United States Court of Appeals for the Eleventh Circuit, Docket No. 84-8452

• • •

Argument and Citation of Authorities 1

A. The issue here concerns the applicability or not of judicial, not administrative, preclusion. It is state judicial assurance of the existence or not of substantial evidence in administrative hearings that is required under applicable Supreme Court decisions. 1

B. The state court's application of the any evidence standard of review was not harmless error on any assertion that the any evidence standard is the same as, or equivalent to, the substantial evidence standard of review 4

C. That Plaintiff was afforded certain basic procedural rights at the administrative hearing does not nullify the requirement of state judicial assurance that the agency decision be supported by substantial evidence 6

D. Plaintiff's instituting of state court proceedings did not require that he exhaust state court appeals nor constitute any election, bar, or waiver of his federal rights 6

APPENDIX 6

Official Code of Georgia Annotated § 50-13-19, formerly Georgia Code Annotated § 3A-120

50-13-19. Judicial review of contested cases; venue, procedure, stay of agency decision, grounds, etc.

(a) Any person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter. This Code section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(b) Proceedings for review are instituted by filing a petition within 30 days after the service of the final decision of the agency or, if a rehearing is requested, within 30 days after the decision thereon. The petition may be filed in the Superior Court of Fulton County or in the superior court of the county of residence of the petitioner. When the petitioner is a corporation, the action may be brought in the Superior Court of Fulton County or in the superior court of the county where the petitioner maintains its principal place of doing business in this state. All proceedings for review, however, with respect to orders, rules, regulations, or other decisions or directives of the Public Service Commission must be brought in the Superior Court of Fulton County. Copies of the petition shall be served upon the agency and all parties of record. The petition shall state the nature of the petitioner's interest, the fact showing that the petitioner is aggrieved by the decision, and the ground as specified in subsection (h) of this Code section upon which the petitioner contends that the decision

should be reversed or modified. The petition may be amended by leave of court.

(c) Irrespective of any provisions of statute or agency rule with respect to motions for rehearing or reconsideration after a final agency decision or order, the filing of such a motion shall not be a prerequisite to the filing of any action for judicial review or relief: provided, however, that no objection to any order or decision of any agency shall be considered by the court upon petition for review unless such objection has been urged before the agency.

(d) The filing of the petition does not itself stay enforcement of the agency decision. Except as otherwise provided in this subsection, the agency may grant, or the reviewing court may order, a stay upon appropriate terms for good cause shown. In contested cases involving a license to practice medicine or a license to practice dentistry in this state, a reviewing court may order a stay or an agency may grant a stay only if the court or agency makes a finding that the public health, safety, and welfare will not be harmed by the issuance of the stay.

(e) Within 30 days after the service of the petition or within further time allowed by the court, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceeding, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record.

(f) If, before the date set for hearing, application is made to the court for leave to present additional evidence and it is shown to the satisfaction of the court that the additional evidence is material and there were good reasons for failure to present it in the proceedings before the agency, the court may order that the additional evidence

be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

(g) The review shall be conducted by the court without a jury and shall be confined to the record. *In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court.* The court, upon request, shall hear oral argument and receive written briefs.

(h) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. (Emphasis supplied.)